

PRETRIAL CONDITIONS OF RELEASE IN MISSISSIPPI:

A Snapshot of Bail Hearings Following Recent Reforms

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I. OVERVIEW AND METHODOLOGY

This report reflects research and data compiled by Berkeley Law students during interviews conducted as a part of the Berkeley Law Alternative Service Trip (BLAST) program.¹ BLAST is a student-led organization that works in conjunction with the Berkeley Law Pro Bono Program. BLAST offers students the opportunity to provide pro bono legal services outside of the Bay Area over winter and spring break. Students work alongside established legal services agencies, gaining insight into the ways these organizations adapt their work to the unique challenges and needs of their respective communities. This service-learning experience helps equip students with the tools to understand the complex needs of communities similar to and different from their own, helping to foster an active generation of thoughtful community lawyers. Although BLAST projects have traditionally been completed in the communities they serve, all 2021 projects were completed remotely due to the COVID-19 pandemic and associated travel restrictions. In 2021, Berkeley students completed projects focused on Atlanta, the Central Valley of California, Hawaii, Kentucky, and South Texas, in addition to this Mississippi-focused project.

Students participating in the 2021 BLAST Mississippi project completed interviews with public defenders, court-appointed defenders, and judges to collect data on pretrial conditions of release in Mississippi following recent reforms to pretrial conditions of release. Over the course of a month, students completed 17 interviews spanning 9 counties. Specifically, students completed seven interviews with public defenders, six interviews with justice court and municipal court judges, and four interviews with circuit court judges.² These

public defenders and judges worked in Adams, Clarke, DeSoto, Forrest, Harrison, Hinds, Leflore, Lowndes, and Pearl River counties.³ Students completed all interviews by phone and recorded many for accuracy, with consent. Some interviewees are quoted with permission, while others preferred to remain anonymous.

Students designed surveys to guide these interviews.⁴ The surveys focused on (1) how courts are implementing reforms to the Mississippi Rules of Criminal Procedure, which now require courts to impose the least-restrictive conditions of release for those charged with a bailable offense that will “reasonably assure the defendant’s appearance;”⁵ and (2) how frequently these decisions are appealed to higher courts through Rule 9 of the Mississippi Rules of Appellate Procedure.⁶ The surveys asked qualitative questions about how bail hearings under procedural Rule 8 are conducted, which Rule 8 factors are most heavily utilized, how often public defenders make Rule 9 appeals, and barriers to filing Rule 9 appeals. Students also examined quantitative data such as bail records provided by the MacArthur Justice Center, however, this data did not provide a complete picture of Mississippi bail conditions and did not reflect revised bails.⁷

This report is not a comprehensive assessment of pretrial detention in Mississippi. The number of interviews was necessarily limited and does not represent a large enough sample size to make any concrete or state-wide conclusions. However, it does provide a glimpse into pretrial conditions of release in Mississippi that can inform further research and action.

II. BACKGROUND: PRETRIAL DETENTION

A. Pretrial Detention in the U.S.

Detention during the “pretrial” period, between when a person is arrested and charged with a crime and prosecuted in court, contributes to the United States’s high incarceration rate. The U.S. has long used money bail as a condition for pretrial release. If a defendant is accused of a bailable offense, is awaiting trial, and has the money, they can pay the bail amount and be released from detention prior to their court date. However, many who cannot pay the bail amount spend months, and sometimes years in jail awaiting trial. Pretrial detention increased 433%⁸ from 1970 to 2015, and doubled between 2002 to 2019 alone.⁹ Three out of five people in U.S. jails have not been convicted of any crime: they are there because they cannot afford bail.¹⁰ Judges determine bail in a variety of ways, with many considering factors such as alleged flight risk, prior record, whether or not the defendant is a danger to themselves or the community, and their ability to pay.¹¹ Depending on the factors weighed, a judge may set bail so high that it effectively precludes pretrial release.

In 2009, about 60% of pretrial releases in the U.S. were conditioned on money bail while the other 40% were on non-monetary conditions such as personal recognizance (a promise to return to court, sometimes in conjunction with additional non-monetary conditions).¹² In addition to more widespread use of money bail throughout the country, the amount of bail has also increased. From 1992 to 2009, the average bail amount in the U.S. increased by 33% for drug offenses, 48% for public order offenses like drug use and sex work, and 67% for violent offenses.¹³ These increases have put bail out of reach for a greater number of people, requiring them to either await trial in jail or turn to for-profit bail bondsmen. Consequently,

“Originally, the bail system was intended to ensure that people would return to court to face the charges against them.

Today, money bail is used to confine those who have been charged but not convicted and to criminalize poverty.”

— MacArthur Justice Center¹⁹

the commercial bail bond business has flourished, with the percentage of defendants who rely on commercial bail bonds for their release more than doubling from 1990 to 2009.¹⁴

Bail disproportionately affects low-income people and communities of color, prompting activism and policy changes to reform or abolish money bail. States like Illinois have passed legislation ending the money bail system altogether.¹⁵ Similarly, studies in New Jersey and Washington, D.C. indicate that rates of court appearance are similar if not better following less-sweeping reforms to money bail.¹⁶ In D.C., 94% of defendants are released pretrial and 91% return for their court date.¹⁷ These gains have been hard fought. Last fall, California voters rejected a ballot proposition that would have replaced the money bail system with a risk assessment tool, but momentum continues to build¹⁸ for state legislative reforms.

B. Pretrial Detention in Mississippi

As of late 2020, Mississippi is the third-highest incarcerator in the U.S., right behind Louisiana and Alaska.²⁰ The prison incarceration rate in the state is 57% higher than the national average.²¹ Furthermore, Mississippi’s pretrial incarceration rate has more than tripled between 1978 and 2013, and pretrial populations represent 55% of the



state's total jail population.²² Not only does this contribute to overall high incarceration rates, but overcrowded prisons represent a significant health and safety issue.²³ Long pretrial detentions have an even more troubling effect: the social and economic disenfranchisement of poor people of color, who are unable to afford exorbitant bails and therefore remain incarcerated for months — sometimes years — awaiting trial.²⁴

The most significant changes to bail practices in Mississippi, and the main subject of this report, came in July 2017 with the implementation of new Mississippi Rules of Criminal Procedure.²⁵ These new rules gave criminal defendants the right to see a judge within 48 hours of their arrest, banned bail schedules, and prohibited courts from using bail as the default condition for pretrial release.²⁶ Instead, the rules now require judges to release individuals who are not flight risks and who do not pose a danger to others on a written promise to appear in court or pay only if they fail to appear.²⁷ Together, these changes have the potential to end cash bail in most misdemeanor cases as well as many low-level felonies.²⁸

In addition, Rule 9 of the Mississippi Rules of

Appellate Procedure specifically allows defendants to challenge a judge's ruling refusing to allow, or imposing overly harsh conditions on, pretrial release.²⁹ Although Rule 9 has been in effect since 1995, it remains under-utilized and is a potential area of interest for researchers and advocates.

Court adherence to the new Rules of Criminal Procedure has been somewhat unclear. Some insurance data has indicated a modest decline in the number of bonds written and revenue collected in the first nine months following their implementation.³⁰ Nonetheless, and as discussed below in our report, many judges seem unable or unwilling to adapt to the new rules, failing to take into account multiple factors when making bail determinations. In addition, judges' control over public defender contracts and appointments for indigent clients contributes to many public defenders being equally unwilling to push back against a judge's ruling, notably by filing a Rule 9 appeal. In the meantime, unconvicted and untried defendants continue to be jailed in inhumane conditions, for months to over a year, either without bail or because they are unable to pay the often excessive bond amounts ordered by the court.³¹

III. FINDINGS

A. Process of Mississippi Pre-Trial Detention and Release

Problematic pretrial detention practices in Mississippi are primarily implicated in three stages of pretrial criminal proceedings: a defendant's initial appearance before the court, a defendant's preliminary hearing (or lack thereof), and a circuit court's review of the conditions of pretrial release imposed by the lower courts. This section of the report will describe the issues involved in each of those procedural stages.

Initial Appearance

Rules for initial appearance: under Rules 5.1(c) and 8.5 of the Mississippi Rules of Criminal Procedure, an initial appearance hearing should occur within forty-eight hours of arrest.³² If no hearing occurs within 48 hours and the defendant is eligible for bail and has not been released, they must be released on a least-restrictive Rule 8 appearance bond. However, not every county or city complies perfectly with the rule.³³ Municipal Court Judge Anthony Nowak explained that "sometimes judges, for various reasons, set bonds infrequently, such as once a week, so people are sitting in jail for a week waiting for bail to be set, and that's wrong. Certainly, any recurring deficiencies in the process need to be corrected whenever they occur."

At initial appearances, judges typically inform defendants of the charges against them and of their rights. Judges also consider probable cause for warrantless arrests, assign attorneys to indigent defendants if necessary, and set bail for the first time.³⁴ These hearings can take anywhere from under five minutes per person in Hinds County—where hearings involve several defendants at a time—to up to thirty minutes in Pearl River and

Lowndes County, according to public defenders. Elements of these hearings, such as presence of representation and inquiries, also varies significantly across Mississippi.

**"Sometimes judges ... set bonds infrequently ... so people are sitting in jail for a week waiting for bail to be set."
Municipal Court Judge Anthony Nowak**

Variation in representation at initial appearance hearings: Based on interviews with judges and attorneys across Mississippi, indigent defendants lack representation at initial appearance hearings in many counties, including in Harrison, Lowndes, and Pearl River. Some counties provide representation on certain days when public defenders are already in court for other types of hearings. Justice Court Judge Audrey B. Minor estimated that about 30% of initial hearings take place on Tuesdays in Adams County, when public defenders are present for criminal court, while initial hearings on other days do not involve a public defender. Other counties have resources to provide public defenders at most or all initial appearances. For example, a public defender in Hinds County said that all defendants are represented at initial hearings. However, these counties may be an exception to the rule. Justice and Municipal Court Judge Polk-Payton describes Forrest County and the City of Hattiesburg as "blessed" to have public defenders available at 50% of weekday initial hearings (0% on weekends) as well as the majority that involve bail. She noted that "a lot of counties don't have the availability of a full-time public defender's office" that would allow public defenders to be available for initial appearances.

Even in courts that do provide representation at initial appearances, many give public defenders have little to no opportunity to speak with clients in advance. Adams County Justice Court Judge Eileen Maher says she cannot think of a single person who has been “truly represented by an attorney in a Rule 8 hearing.” She explained that even if an attorney is present, the attorney is often juggling multiple clients and may only be able to get scant information, “like a couple telephone numbers.” There are exceptions, such as in Judge Polk-Payton’s courtroom, where judges “remain in chambers and give . . . the public defender an opportunity to talk with the defendants before [the bail hearing] starts.” But she recognizes that “everyone doesn’t do it like that.”

Judge Audrey B. Minor also allows the rare defendant who is appointed an attorney for their initial appearance to “go to the other room and talk” before the hearing. This practice can allow the attorney to gather and then provide information and context to the court about the client and crime that a court might not otherwise hear and to request a lower bail than the prosecutor. Public defenders in general said that their presence in initial hearings does help by altering the dynamic of the hearing and providing credibility to requests and arguments for lower bonds. Judge Polk-Payton explained that such representation “protects the constitutional rights of the defendant . . . at all stages of the proceeding.” Not all judges agree that attorneys are helpful at hearings. One Clarke County Judge said, “to tell you the honest truth from the other side of the bench, there’s not much [attorneys] can do at that point in time, other than to make sure that the defendant understands what’s happening to them.” However, this could be a product of a failure of courts to make inquiries beyond the charging offense in the initial hearing or to allow attorneys to speak with their

clients before bail determinations.

In courts where defendants go unrepresented at initial appearances, some judges instruct unrepresented indigent defendants not to speak and to avoid asking questions. This is meant to protect defendants from incriminating themselves in court. Adams County Justice Court Judge Eileen Maher explained, “when they try and tell me something about their case, I stop[] them. And I say, I’m appointing an attorney. I don’t want to hear the details of your case. This is for your protection, not mine because you don’t know the law and you might tell me something that hurts your case.” However, this practice also means that many courts may make initial bail decisions based entirely on what they hear from the prosecutor about the crime the defendant is alleged to have committed.

Preliminary Hearings

Under Rule 6 of the Mississippi Rules of Criminal Procedure, pre-indictment defendants charged with a felony are entitled to a preliminary hearing upon request unless they have waived their right to a preliminary hearing.³⁵ Preliminary hearings are held subsequent to a defendant’s initial appearance and are intended to determine probable cause and the conditions for a defendant’s pretrial release, if any. Preliminary hearings are typically presided over by either a justice court judge or municipal court judge and can last anywhere from five minutes to one hour or more. Under Rule 6.1(a)(1), preliminary hearings must be held within 14 days of a qualifying defendant’s request. If a preliminary hearing has not commenced within the required 14-day period, a defendant shall be released on recognizance under Rule 6.1(c)(1) unless the hearing has been postponed under Rule 6.1(d).

Although preliminary hearings serve in part as bond



hearings that provide an opportunity to challenge conditions of pretrial release imposed at initial appearances, qualifying defendants often unknowingly waive their right to a preliminary hearing as a condition of pretrial release. Pursuant to Rule 6.1(b), an entitlement to a preliminary hearing can be waived either “in open court or by written waiver.” If a defendant has a preliminary hearing, it is often the first point in Mississippi criminal proceedings at which they are afforded counsel. Since many defendants are not provided counsel at their initial appearance, pro se defendants may unknowingly waive their right to a preliminary hearing on conditions of pretrial release. According to two Mississippi public defenders, pro se defendants who accept a bail reduction (often to “an amount they still can’t afford”) or who file pro se motions to reduce bond at their initial appearance effectively waive their right to a preliminary hearing on conditions of release. As a result, many defendants who waive their preliminary hearing at their initial appearance are detained for months on end without access to counsel in any bail proceedings while awaiting the next stage of their proceedings. André de Gruy of the Mississippi State

Public Defender’s Office refers to this extensive pretrial detention of defendants without access to counsel as a “black hole” in Mississippi pretrial criminal proceedings.

Conversely, even if a defendant does not waive their right to a preliminary hearing on conditions of their pretrial release, justice court and municipal court judges presiding over the hearings often fail to adequately apply Rule 8 guidelines in determining conditions of release. Harrison County Public Defender Robert G. Germany, Jr. has “had more than one preliminary hearing where [he] basically throws the law at the justice court judge” to no avail. Although some Mississippi public defenders report moderate success in getting reduced pretrial release conditions at preliminary hearings, Mr. Germany estimates that “99 times out of 100, the original bond amount just stays the same.” In other words, it can be rare that a preliminary hearing on conditions of pretrial release will result in less onerous conditions than those originally imposed at a defendant’s initial appearance.

Finally, lower court judges presiding over preliminary hearings on conditions of release do not always explain their reasoning, so challenges to conditions of pretrial release in higher court often lack a substantial lower-court record to rely on. According to Mr. Germany, it is not uncommon for lower court judges in preliminary hearings to just set pretrial release conditions and simply say “that’s my answer” without further justification.

Circuit Review

At the circuit court level, bail decisions made at the justice or municipal court level can be reviewed and altered in a few ways: via regular circuit review, motion to reduce bond, or habeas corpus petition. Several of the public defenders interviewed indicated that circuit judges tend to apply Rule 8 more consistently and appropriately than lower court judges. Circuit court judges, unlike justice and municipal court judges, must have a law degree, which may contribute to their knowledge and understanding of the rules and how to apply them.

Regular circuit review under Rule 8.5(c) requires circuit judges to review the conditions of release for every felony defendant eligible for bail who has been in jail over 90 days. This review happens every term of court, meaning the frequency of review varies based on how many terms a given Circuit has per year. Under Mississippi Code Ann. § 9-7-3(1), circuit courts are only required to have terms in each county twice per year. In many districts, reviews occur more frequently. Circuit Court Judge Mozingo said that the 15th Circuit

conducts reviews every two to weeks and 4th Circuit Court Judge Carol White Richard reviews bail amounts about once a month. However, in at least some circuits, these reviews happen far less often, meaning that excessive bails resulting from lower courts not properly applying Rule 8 may not be reviewed for several months in some parts of Mississippi.

Furthermore, although circuit judges tend to be more aware of the Rule 8.2 inquiries than lower courts, they are only required to receive the names, charges, and number of days in custody of those whose bail they review. Consideration of reducing of bail is completely left to the discretion of the court.³⁶ For example, 15th Circuit Court Judge Mozingo explained that “before COVID, a defendant would probably... have had [sic] to make a motion to reduce their bond formally in court before I would probably consider it.”

Some circuit judges do complete more thorough inquiries through standard reviews, though this does not appear to be required by the rules. Circuit Judge Blackmon Sanders of the 6th Circuit explained that she does not review bail decisions of lower courts, but rather simply sets what conditions she deems fair without regard to the lower court. In her opinion, lower courts “simply set really ridiculous bonds in the area we live in.” She explained that lower courts often look at a charge like murder and automatically set bonds so high, that no one would be able to make them. As a result, she reviews bonds to make sure they comport with the statutory bond chart, but also the defendant’s ability of to pay and the context that may contribute to or reduce a defendant’s flight risk and apparent dangerousness. Reviews like this can be extremely effective in reducing bonds. Public defender Matthew Busby said that in Pearl River County, regular 8.5 circuit review hearings

It is not uncommon for lower court judges in preliminary hearings to just set pretrial release conditions and simply say “that’s my answer” without further justification.

**Harrison County Public Defender
Robert G. Germany, Jr.**

resulted in bail reductions for about 33 people in May and June of last year. However, the variability of term regularity and vagueness of the rules may result in inconsistent effectiveness of these reviews across Mississippi.

Public defenders and pro se defendants can also file motions for reduction in bail. These motions can push a circuit court to review bail faster than they would on the regular review schedule. As Judge Mozingo, some courts like his will generally not consider reducing bail unless the request is brought via motion. Motions also allow a public defender to provide more information (such as the context that the Rule 8.2 inquiries would otherwise have provided) to the court in making their decision. Circuit Judge Mozingo described how these motions “tell why the court should reduce the amount of bond.” He went on to say that such motions are rarely objected to by the prosecutor, further evidence that lower court bonds are often set too high.

Harrison County Public Defender R. Geoffrey Germany, Jr. explained “motions for bond reduction will often be granted by circuit court judges reviewing the justice court judge's bond amount if the bond is unreasonable because circuit court judges actually know the law.” However, these motions are not always effective. Another public defender explained that in some counties these motions often simply lead to faster indictment because “it puts the [prosecutor] on notice that this person needs to be indicted, because he has been in custody this amount of time.” A Hinds County public defender said that their circuit court has ignored motions in the past. Motions may also be filed with less frequency in circuits with regular review processes that public defenders rely on to reduce bail. Judge Mozingo said he believes he receives these types of motions

fairly infrequently because “[the court is] already addressing these things without them having to” in the form of the standard reviews.

Finally, habeas corpus petitions — separate civil proceedings filed when a defendant has been detained at an unreasonably high bond to the point that it might be considered “illegal confinement or detention”—are the final method by which defendants can seek bond reduction.³⁷ These types of petitions were not the focus of this project, but were mentioned by some interviewees as another method to seek bond reduction in particularly egregious cases. Justice and Municipal Court Judge Polk-Payton described one example from when she was a public defender where a habeas writ filed in circuit court resulted in a municipal court reducing a \$1.5 million bond to \$30,000. That said, a current public defender did mention that, like motions, habeas petitions can also result in a faster indictment.

Motions for bond reductions often simply lead to faster indictment because “it puts the [prosecutor] on notice that this person needs to be indicted, because he has been in custody this amount of time.”

Unnamed public defender

Other Factors that Contribute to Pretrial Detention

All of the issues mentioned so far arise before a defendant has been indicted by a grand jury. However, issues involving indictment and post-indictment processes also contribute to unconscionably long instances of pretrial detention and delay. Two additional issues that can prolong the duration of pretrial detention are underfunded crime labs and delayed grand jury indictments.



For example, Adams County Justice Court Judge Eileen Maher called the pretrial delay between indictment to trial “horrendous.” She knows of at least five inmates in the Adams County jail who have been held for more than two years while awaiting indictment. The Judge averred that one cause of such inexcusably long delays is underfunded, “basically non-existent” crime labs that are excruciatingly slow to produce forensic evidence necessary for some indictments. As a result, unindicted defendants languish in pretrial detention for extended periods of time.

Similarly, unindicted defendants may be subject to needless pretrial detention as they await the next grand jury to be empaneled. A Clarke County Judge commented that “it’s ridiculous for someone to spend months in jail” simply because it takes months to empanel a grand jury and obtain an indictment, yet it’s a common occurrence.

B. Perceptions of Mississippi Rule of Criminal Procedure 8

Application of Rule 8 Factors in Mississippi Criminal Courts

Municipal and Justice Court Application of Rule 8.2 Factors

Mississippi Rule of Criminal Procedure 8.2, which embodies the state legislature’s guarantee against excessive bail by requiring that judges impose the “least onerous conditions” of release, is not consistently applied. This rule is meant to maintain the “presumption of innocence of the accused, [and] the constitutional right of a defendant charged with a noncapital offense to be released on bail.” The inquiries called on by the rule are intended to ensure that courts focus on whether a given defendant poses a danger and whether they will appear in court.³⁸ In making their decisions on conditions of pretrial release, judges are required by Rule 8.2 to consider fifteen separate factors (“Rule 8 factors”) that might influence a person’s threat level to the community when making decisions on conditions of release for criminal defendants.³⁹ Courts that do not seek out information about each of the Rule 8 factors may make bail decisions without access to all the statutorily requisite information.



Overall, many public defenders believe that judges give the most weight to the narrow set of factors that focus on the nature of the crime being charged and the criminal history of the defendant. Judges, in contrast, generally feel they apply the Rule 8 factors appropriately even though their approaches vary by county and court level.

Several public defenders described the nature of the crime and the criminal history of the defendant as among the most common important considerations in initial bail decisions. One public defender in Hinds County said that judges “weigh most heavily the actual charge that [a person has] been charged with rather than . . . whatever ties to the community or whether they have employment.” Lauren Hillery, a second Hinds attorney, backed up this account. In Lowndes County, another public defender said that Rule 8 factors three through eight, relating to the nature of the offense charged, the violence involved in the charge, and the criminal history of the defendant were most relevant to judges. Echoed another attorney: judges look at “the charge that [a person] has been charged with, like is it a violent crime, is it a property crime, is it a drug crime, did they have a weapon with the drug crime, stuff like that. And then they look at their criminal background and then really that’s all.”

Interviews with justice and municipal court judges supported the observation of the public defenders, with the nature of the offense being the only Rule

8 factor mentioned by every judge interviewed, and criminal history being raised by the majority. In describing the process of setting bail, one justice court judge said they discuss the charge with the defendant and then “set the bail according to what the charge is . . . and then I look at if they’ve been arrested before, if they’re on probation, something like that—that’s how I assess the bond... the seriousness of the charge.” Another justice court judge echoed this sentiment, saying a “big part of my consideration is what are they charged with? What’s the severity?” The judge also cited a person’s criminal record and history of violence as a “huge consideration.” A municipal court judge in Hinds County also expressed the importance of criminal history: “If a defendant is already out on bond for the same or similar charge, generally I’ll deny bond. I get really annoyed about repeat offenders.” Given that the Rule 8 factors are meant to “ensure that a judge not give inordinate weight to the nature of the present charge” this does not comport with the spirit of the rule.⁴⁰

Former justice and municipal court and current 15th Circuit Court Judge Anthony Mozingo explained that “many times [justice and municipal court judges] don’t have all the facts when they’re setting those bail bonds at first appearances and they only know [the] original charge.” He went on to note that when lower court decisions rely on probable cause evidence and the charge provided by law enforcement, “a lot of times that turns out to be not the whole side of the story that needs to

be evaluated when determining bail or the amount of bond.”

Most judges interviewed did raise other Rule 8 factors, many of which pertain primarily to reducing flight risk, a key statutory goal. Ties to the community in particular was a factor raised by several judges in this context. Angela Broun Blackwell, a public defender in Harrison County, said judges also consider a person’s ties (or lack thereof) to the community, especially if they are not a local resident. This sentiment was repeated by R. Geoffrey Germany, another public defender in Harrison County.

Some of the judges interviewed specifically indicated that they do a more systematic review of the Rule 8 factors. Anthony Nowak, a municipal court judge in Hernando, explained that he “can’t say any one factor is more important than another and all must be weighed together.” He said he reviews the nature of the charges, the criminal record, where the person lives, contacts in the area, employment, potential indigency status, whether they have charges pending in any other jurisdiction, if they care for a household member or if they have any health issues. But, “the ultimate consideration is whether or not they are a flight risk.”

Two other judges, Municipal Court Judge June Hardwick and Municipal and Justice Court Judge Polk-Payton, brought up most of the statutory inquiries when interviewed. Judge Polk-Payton described how she reviewed “the way that [she does] things to make sure that [she] was in compliance” when the revised Rules were released. However, both judges have also worked as defense attorneys. Each has been described as a “public defender in a robe.”

Lack of training may also contribute to disparate

application of Rule 8 factors. Justice and municipal judges are not required to have a law degree, and many do not. In addition, it is unclear whether additional systematized training is available to enhance awareness of these recent reforms. Some judges at this level did not mention the statutory inquiries specifically. Of the public defenders interviewed, only one said judges at that level regularly follow Rule 8 procedures. A Harrison County public defender explained “Rule 8 has created a clearer reference, but justice court judges fail to apply the law because they don’t have the education.”

The result is that many lower court judges impose excessive bail. These bail amounts often do not reflect the context or circumstances of a defendant’s specific situation. Bail determination often do not take into account age, employment status, character and reputation in the community, and context or information to demonstrate a defendant poses no danger or flight risk. As a result, the first opportunity for defendants to get access to bail or personal recognizance tend to result in overly high bail amounts that are lowered later. Some two-thirds of the public defenders interviewed felt that lower court judges impose excessive bail on defendants “most of the time,” and a similar percentage felt that judges failed to impose the least restrictive conditions of release “most of the time” or “always.”

Circuit Court Review of Lower Court Bail and Application of Rule 8 Factors

Several public defenders felt that circuit courts tend to more systematically apply the Rule 8 factors than lower courts. Two-thirds of the circuit court judges interviewed described the conditions set by the municipal or justice courts as being too restrictive. In applying Rule 8, circuit court judges were more likely to cite more of the factors in their decisions.

One Circuit Court judge said “I just look at the factors in Rule 8... all of them are important, they all have to be given consideration.” Judge Carol White echoed that she looks at “the typical bill factors” and listed the various considerations outlined by Rule 8.

Circuit court judges still place a high importance on the charged offense and criminal history when making their decisions, along with concerns about flight risk. Judge Carol White Richard said that the most important factors for her were the likelihood that the defendant will appear for trial, the nature of the offense, and the substance of the evidence. Judge Anthony A. Mazingo said that his number one consideration is whether the type of charge involves victims, especially the impact on victims if any are involved. Judge Lillie Blackmon Sanders said she examines whether a person is a flight risk or a danger, and the value of whatever is allegedly stolen. All of the judges cited prior criminal history as an important consideration for determining bond. Many of the circuit court judges also mentioned ties to the community as an important consideration in determining flight risk.

The “least onerous conditions” of release are often neither easy nor affordable

Bonds calibrated to the least onerous conditions of release are very rarely set to an amount a person can reasonably afford. One circuit court judge said that her typical bond amount is \$50,000. In Hinds County, a public defender mentioned that whenever the charge involves a gun, regardless of actual violence, one judge automatically sets bail at a minimum of \$100,000. Judge Lillie Blackmon Sanders said she’s seen “\$10,000 bonds in shoplifting cases where someone took something that was worth all of \$600.” Some courts have tried to reduce their average bond amounts. A judge in Clarke County added that the “days of those \$30,000, \$40,000, \$1,500,000 bonds . . .

Bonds calibrated to the least onerous conditions of release are very rarely set to an amount a person could reasonably afford.

“I’ve seen \$10,000 bonds in shoplifting cases where someone took something that was worth all of \$600.”

Circuit Court Judge Lillie Blackmon Sanders

are pretty much gone.” The judge acknowledged that there is “not a lot of money flying around” in Clarke County so they try to set “minimal bond[s]” but that minimal amount is still \$2,500.

Release on personal recognizance is also extremely rare; in the eyes of many judges, the absolute minimum condition of release has shifted from personal recognizance to unsecured bonds. Judge Blackmon Sanders explained that personal recognizance is not often utilized. Matthew Busby, the chief public defender in Pearl River County, said judges naturally want to “up the ante” because of worries about crime statistics. According to him, secured bonds amount to about 90% of bonds issued in his county—recognizance is only considered if the charge is a low-level felony where the person meets certain immutable characteristics such as being female and white. Judge Blackmon Sanders said judges do not use release on recognizance enough. While she acknowledged a high level of scrutiny is required, she feels that judges should nonetheless consider recognizance as an option.

Lack of judicial accountability may contribute to disparate implementation of Rule 8

At the municipal and justice court levels, one possible reason judges do not apply the Rule 8.2 factors in full is because they lack any meaningful accountability. Judges, wielding their discretion, face



few repercussions for failing to uphold the rights of those charged with crimes. Without a judge leading the charge, it falls upon advocates inside and outside the criminal legal system to raise the salience of defendants' rights.

For example, last year a clerk in one Pearl River County court realized that judges were not imposing "the least onerous condition(s)" of pretrial release in misdemeanor cases. She took it upon herself to alert the District Attorney's office to the issue, who in turn worked with the municipal court to formalize a more holistic Rule 8.2 analysis. That bit of inside advocacy has made a difference for indigent defendants, according to Busby, the Chief Public Defender in Pearl River County. "When a young person gets booked on a misdemeanor, if they're not bonded out within 48 hours of arrest, they automatically get released on their own recognizance." He added that this leniency doesn't apply to certain misdemeanors, such as DUIs, simple assaults, and domestic violence charges. "Those people will have to bond out. But for everyone else—your missing tag lights, no license, no insurance arrests—they will walk out within 48 hours."

Such changes are by their nature piecemeal and limited. One court's actions do not necessarily spill over to another's. That said, some indigent defense attorneys report that judges today are more conscious of how pretrial detention negatively affects their clients. A court-appointed attorney in northeastern Mississippi says Rule 8 reforms have "lessened objections" from prosecutors and "opened the thought process to issuing more OR bonds."⁴¹ But in other parts of the state, defense attorneys have noticed very little change from the pre-Rule 8 days. "The system can't follow the rules because of our [lack of] resources, so [judges] have to violate them," said one Hinds County Public Defender. "I think they're looking at these rules practically: 'we can't let this guy out.'"

Judges' emphasis on the nature of the crime and defendants' criminal records makes some intuitive sense; a person charged with a serious crime of violence and with a record of similar accusations may pose more of a risk than a person charged for the first time ever with a nonviolent offense. At the same time, Rule 8 counsels a holistic review. And at the circuit court level, where a defendant can

seek reconsideration of a bond, judges have a built-in reason to apply that more comprehensive review because of the context of when they're considering pretrial detention: either on motion or during their 8.5(c) hearings. This is evident in some circuit court judges' methodical approach to bond reconsideration. That approach, however, is not the norm across the board. Ideology still plays a role, as evidenced by other judges' victim-focused approaches.

A fear of being seen as “soft on crime” can also warp bond determinations

Gun violence in Mississippi has been on the rise since the beginning of the COVID-19 pandemic, a problem particularly acute in Hinds County. A public defender there, speaking of a municipal court judge, says the specter of gun violence often overshadows any mitigating factors that might make a client less a risk of future violence. “Because gun violence is so bad in Jackson, and ‘people need to be taught lessons,’ [the judge’s] cap on those charges for bond is \$100,000 or higher no matter what.” Recounting an exchange in open court, the defender recalls another judge making an offhand remark that seemed to conflate important issues. “I have heard this judge say, ‘if a person has a gun [while possessing drugs] then you already know what they intend to do with the gun.’”

Some judges attribute the pressure to set higher-than-necessary bonds to the local media's tendency to sensationalize crimes. Forrest County Justice Court Judge Gay Polk-Payton recounted a time when she was a public defender and a judge dramatically lowered her client's bond. “I would presume [that happened] because the media was no longer watching.” But now, as a judge herself, Polk-Payton says she tries to rise above such concerns. “I don't dance for the media because... the constitution is the constitution whether the

“I got a call from the mayor's chief of staff. Ultimately I had to—emphasis on ‘had to’—revoke that defendant's bond.”

**Unnamed judge,
on setting \$100,000 bond for a
defendant with no violent priors**

media's watching or not.”

A municipal court judge in a major metropolitan area cited a more direct point of pressure: elected officials. Earlier this year, the judge handled a case involving a young woman who fired a gun from the passenger seat of a moving car and killed a child in an adjacent vehicle. In addition to charging the shooter, police charged the driver of the car with murder and two other felony counts. According to the municipal court judge, the driver was a known drug dealer in town but had no priors on his record that involved violence. He was on probation at the time of the shooting, but had been reporting to his probation officer. During the initial appearance, the judge decided to set the driver's bond at \$100,000 per count. “Later that evening, I was at home,” said the judge. “I got a call from the mayor's chief of staff. Ultimately I had to —emphasis on ‘had to’—revoke that defendant's bond.”

C. The Under-Utilization of Rule 9 Appeals

Public defenders can challenge bail conditions by filing a “Rule 9” petition under the Mississippi Rules of Appellate Procedure calling on the state Supreme Court or the Court of Appeals to review the defendant's conditions of release. A Rule 9 appeal is designed to trigger a prompt hearing that reexamines the nature of the offense, the weight of

the evidence, the defendant's family ties, and other pertinent factors.⁴²

Although Rule 9 appeals are part of the official procedure for challenging a set bond, in practice, we were unable to find an example of Rule 9 actually being used. The public defenders we spoke to had never made a Rule 9 appeal, and the judges had never encountered such a motion. There appeared to be many possible reasons for the lack of Rule 9 appeals, including:

Attorneys have other preferred alternative methods of review

Several public defenders and judges expressed a preference for other procedures when seeking to reduce bail terms. Those options include filing a motion to reduce bond, a writ of habeas, or relying on periodic "jail review" whereby circuit court judges evaluate bail for every eligible person who has been in jail for more than 90 days. Judge Gay Polk-Payton, a former public defender, recalled an example where a writ of habeas was used to significantly reduce bail, "I've done it as a lawyer," said Judge Polk-Payton. "I filed a writ of habeas in circuit court to ask the circuit judge to validate [the lower court's] reasoning behind how high the bond was."

Public defenders are responsible for paying court filing fees personally.

Angela Broun Blackwell, an Assistant Public Defender in Harrison County, shared that although the terms of bail are set at the defendant's initial appearance, public defenders can use the subsequent preliminary hearing to argue for lowering the bond. Broun Blackwell observed that the preliminary hearing is typically the first and best opportunity to argue for lowering bail conditions. In addition, several public defenders interviewed

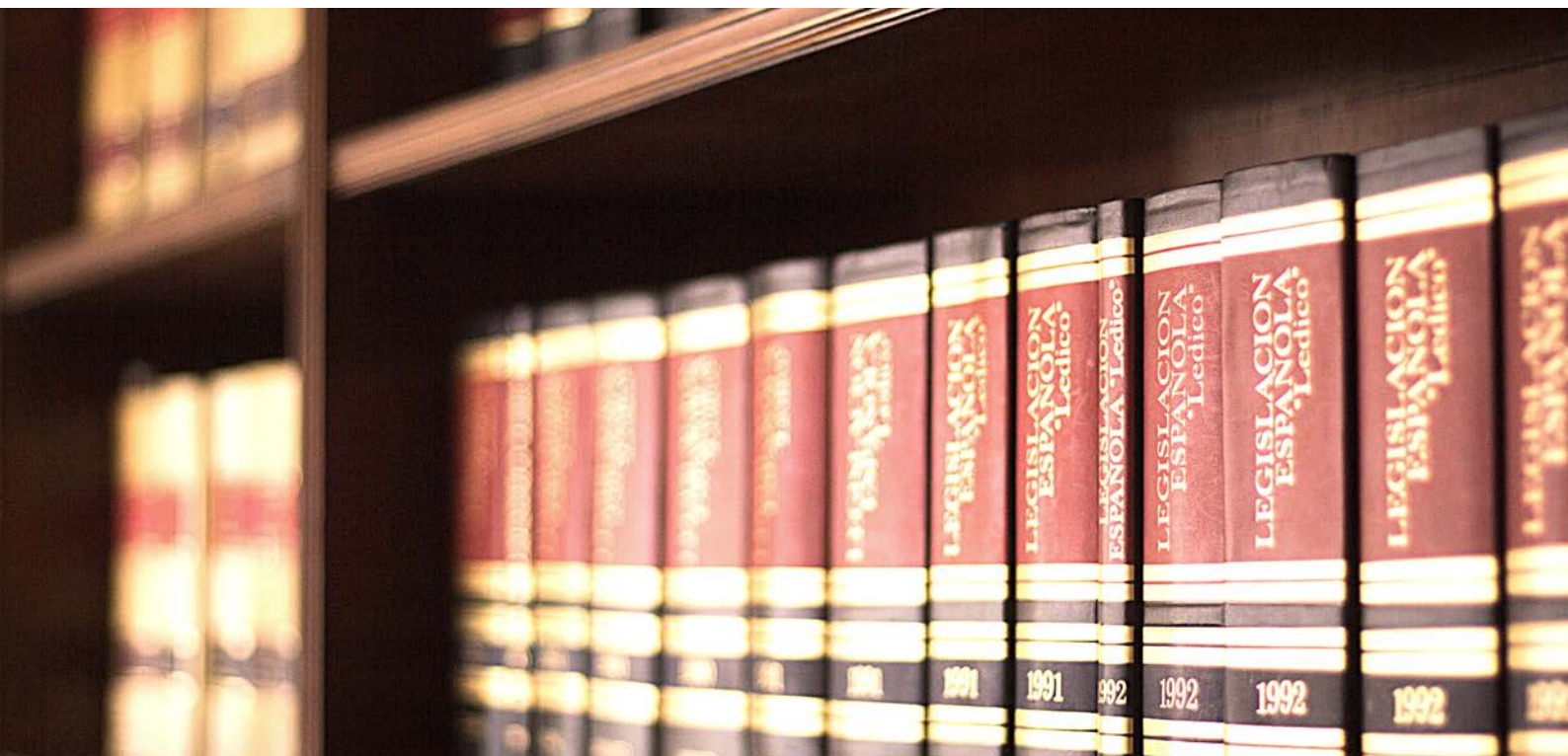
for this project expressed confidence that circuit court judges carefully consider Rule 8 factors when considering motions to reduce bond, providing an opportunity to reconsider excessive bail set by lower courts.

One circuit court judge reported that Rule 8 factors are given particular attention when a motion to reduce bond is filed. The judge shared that reputation and character, ties to the community, past criminal record, whether there are victims, employment (including location and length), affordability, and whether the District Attorney objects are all highly relevant considerations.

Observing a similar dynamic between municipal and county courts, Judge June Hardwick, a Jackson County Municipal Court Judge shared: "Once we municipal court judges deny bond or set a bond the defense attorney knows that the defendant cannot post, two things can typically happen. Either the defendant sets the case for preliminary hearing back in our court, which doesn't make sense to do—generally speaking. Say it's a violent charge and I've already denied bond for the aforementioned reasons, I'm not going to reconsider now. The more viable option is transferring the case from municipal court to county court."

Costs and court fees

Attorneys expressed concern regarding costs associated with filing a Rule 9 appeal. Attorneys noted that even modest court fees accumulate quickly across many clients. Lauren Hillery, an Assistant Public Defender from Hinds County, noted that public defenders are personally responsible for paying court filing fees. Another public defender echoed this concern: "It would be nice if we didn't have to [pay court fees] out of pocket," and suggested creating a fund that public defenders could draw on to pay court fees.



Perhaps more significant than out-of-pocket expenses is the opportunity cost associated with a Rule 9 appeal. Attorneys expressed skepticism that such an appeal would be worth allocating their scarce time and resources given the high level of uncertainty of success.

Fears that Rule 9 appeals will not accomplish anything for the client

One public defender shared: “I have had co-workers who filed multiple [Rule 9 appeals] but they never go anywhere. The Court of Appeals chooses not to hear them, or they just don’t rule in their favor. What I gathered from that is that they just aren’t helpful.”

The attorney further explained: “I know [a Rule 9 appeal] is not going to go anywhere. I know that is sad to say but I feel like it would be a waste of time. What I have done, other than appealing to the Supreme Court or the Mississippi Court of Appeals, is file a habeas corpus petition” to try to get before a circuit court judge and raise the argument that a client has been detained illegally without indictment.

Political concerns and fears that Rule 9 appeals will make things worse

Closely related to the fear that a Rule 9 appeal would not actually be effective was the fear that a Rule 9 appeal would be too effective but in all the wrong ways. Multiple attorneys mentioned past efforts fighting for reforms before realizing it wasn’t necessarily the best approach.

Lauren Hillary, an Assistant Public Defender in Hinds County, noted that some public defenders may be cautious about Rule 9 appeals out of concern that such filings may irritate the judges they have to appear before on a daily basis. Matthew Busby, the Chief Public Defender from Pearl River County said he used to be “like Don Quixote” but now chooses his battles more carefully. “I get a lot more now with my tactics than I did back when I was fighting every fight.

When you work in these jurisdictions and you’ve got to go against these people every day, you sometimes have to put kid gloves on. You can’t just fight for the sake of fighting when you’re trying ‘to benefit all of your clients.’” Added a public



defender in Hinds County, “I tried to pick this particular fight a year ago. Clients will have a first appearance, and have a crazy bond amount or no bond amount set. The preliminary hearing never happens in a timely way. We would file a motion to try and get someone released, and a judge would just ignore the rule. It could take ninety days, four months, or six months for the client to have a preliminary hearing. [But] if we pushed these cases to the [state] Supreme Court, it would’ve created bad law. If the Supreme Court had issued something, it would not have been helpful to us, and that would have been a giant waste of time for everyone.”

Attorneys are unaware of the Rule 9 option

Given the heavy workload of all public defenders and the reality of having mere minutes to defend each client, some suggested that attorneys may not be using Rule 9 because they don’t know enough about it or how to utilize it.

“I’ve never had any of my bond rulings appealed,” said a Circuit Court judge. “I don’t think that’s because I’m that great at bonds. I think it’s just something lawyers don’t think of [even though]

they’re good lawyers who appear before the court. They think, ‘we’ll just come back later and get a reduction.’”

Angela Broun Blackwell, an Assistant Public Defender with Harrison County, suggested that a simple form might be enough to help guide and encourage public defenders, who could look at draft motions, draft petitions, and relevant case law citations.

Judicial reforms

Some attorneys and judges suggested that checks and balances on judges — rather than the Rule 9 process — were the best way to address bonds.

As one public defender in the Jackson area said, “When it comes to the bond rulings it’s really going to be up to the judges to want to do better as far as following the rules and applying the factors that they are supposed to.” The public defender continued, “We can do everything that we can, but if no one is going to hold judges who make the ultimate decisions in courtrooms accountable, then nothing is going to help. It starts with us, but ends with them.”

One judge suggested that if a judge is abusing the process, or failing to fulfill their duties, a better approach may be reporting bad judges to the state Supreme Court. “Let’s say a judge is not conducting initial appearances in a timely manner. Someone could report me, get me to change the way I do things. Judges need to be educated — I mean, they should already know — about the purpose of bonds, the factors to look for, the flight

risk. The Supreme Court can review, educate them, and when appropriate, reprimand them.” Ultimately, said one Circuit Court judge, “[i]t would be better to have a system where unless it’s determined to be necessary, then cash bonds would not be required. If they were, they would be in amounts that people could afford...Most people do come back. And if they don’t, that’s the kind of situation that you [as a judge] have to weigh.”

IV. CONCLUSIONS AND IDEAS FOR FURTHER STUDY AND ACTION

The 2017 reforms to the Mississippi Rules of Criminal Procedure were a historic step toward reducing excessive bail and toward a system where those not convicted of crimes are no longer unnecessarily jailed. However, further research, education, and support is needed to bring these rules to life in practice. Our interviews revealed several areas that are ripe for further research and education, mainly around procedures for initial hearings and appointment of counsel; utilization of Criminal Procedure Rule 8 reforms; challenges to excessive bail through circuit court review; and use of Appellate Procedure Rule 9. A summary of these areas for further study and action are below.

A. Initial Hearing Procedures

Our interviews indicated that initial hearings vary widely across the state, both in terms of how Rule 8 inquiries are conducted, and how public defenders are appointed to indigent defendants. Further research about variance of Rule 8 hearings and representation by counsel across jurisdictions could inform interventions to enhance fulsome use

of Rule 8. Ideas for further study and action include:

Research on the timeliness of initial hearings:

Our interviews revealed delays in the initial appearance hearings, and a failure to release bailable defendants if hearings do not occur within 48 hours of arrest, as required by Mississippi Rules of Criminal Procedure Rule 5.1(c) and 8.5. Further research could help inform effective interventions to enhance compliance, such as:

- Data collection and court/jail monitoring regarding whether defendants actually get timely 48 hour hearings; and
- Additional research regarding barriers to timely hearings in courts where they do not regularly occur within the statutory period (48 hours).

Enhance representation by counsel at initial hearings:

One judge in Clarke County said defendants are “brought in for their bond hearing so quickly that they really don’t have it all in the pipeline to have

an attorney attached to them at that time because nobody wants to delay their possible release, waiting on an attorney to be attached just to be there at a hearing.” However, if an attorney is necessary to create equitable and actual access to opportunities for release (either on personal recognizance or lower bond amounts) in most courtrooms, attaching an attorney in advance of an initial bond hearing may be necessary. Future research paths could include:

Data collection on bail amounts imposed at initial hearings for represented versus unrepresented defendants. Adams County could provide a useful case study since some defendants are represented and some not on a fairly random basis. It would additionally provide a useful data set since at least one judge utilizes the best practice of allowing appointed attorneys some time to speak to their new clients in advance of the bond hearing.

Enhancing transparency in preliminary hearing decisions on pretrial release conditions. Requiring judges presiding over preliminary hearings on conditions of pretrial release to create more transparent records of their reasoning in determining conditions of pretrial release would enable higher courts reversing their determinations to more effectively enforce adherence to Rule 8’s guidelines. Alternatively, data collection on representation at initial appearances through surveys or court observations could aid transparency.

Research on best practices for initial hearings with unrepresented defendants. Conduct additional stakeholder research with public defenders and legal research on the cost versus the benefit of judges asking unrepresented defendants for responses to some of the Rule 8.2 inquiries (age, employment, etc.). This could include consideration of alternative methods to provide relevant

information to the court in advance of initial bail decisions.

Developing best practices for effective representation at initial appearances: Public defenders who are present when appointed during the initial hearing often are not given time to speak to defendants before bails hearings or are not given chances to speak at the hearing. Court observations to provide a clearer overall picture of court practices when attorneys are appointed and present at the initial hearing could be useful in understanding current practices and developing recommendations. These recommendations could include that judges (1) provide time for counsel to meet with defendants before commencing the bond hearing and (2) systematically go through Rule 8.2 inquiries, giving both the prosecutor and the represented defendant time to provide relevant information to the court and to request reasonable bail amounts.

Either consistently providing representation at initial appearances or disabling pro se defendants from waiving their preliminary hearing on conditions of pretrial release: Without representation at their initial appearance, many pro se defendants acquiesce to conditions of pretrial release that result in a waiver of their right to a preliminary hearing on conditions of pretrial release. Courts could reduce the number of inmates subject to unfeasible conditions of pretrial release. This would also require, however, that judges presiding over preliminary hearings on conditions of pretrial release adequately follow Rule 8’s guidelines.

B. Rule 8 Utilization

Our interviews suggest that Rule 8.2 inquiries are not made consistently (which also comes up in preliminary hearings). In addition, there may be a



perception gap among judges who feel they are following the rules diligently, yet in reality are leaning most heavily on conditions on the defendant's criminal history and offense. If so, education and outreach could help enhance utilization of Rule 8 and lead to more comprehensive pretrial hearings. Some strategies could include:

Creating pilot projects to enhance Rule 8 use:

Research ways to motivate lower court judges to implement Rule 8 more consistently, possible strategies may include:

- Methods to further educate lower court judges regarding the rules.
- Court monitoring and media strategy to increase public attention and pressure to obey the rules.

Conducting a survey on bail amounts and identifying excessive bail hot spots:

A comprehensive snapshot of bail practices throughout the state could identify jurisdictions most in need of outreach because of excessively high bail at initial hearings. This could include:

- Data collection and analysis on how often

initial bail amounts are reduced and by how much, and;

- Court monitoring for additional data on court reasoning offered for setting higher bail amounts.

Collecting data on bail amounts could help public defenders target their resources: For example, consider:

- Options including motions to reduce bond and policy changes to pressure lower courts to state reasons for bail amounts/conditions.
- Pushing for more responsive circuit court review of lower court bail decisions: such as mechanisms so lower courts are aware of when circuit courts alter their bond decisions and their reasons for doing so.

C. Circuit Review of Bail Decisions

Several public defenders and judges indicated that circuit court review may be an easier avenue for bail reductions than Rule 9 appeals. However, infrequent terms in some courts lead to infrequent regular review. Areas for future study could include:



Research on how often each circuit conducts regular review:

How often does each circuit have a term and are all the circuits complying with the rule about conducting review each term.

Research on which method to reduce bail:

(regular review, motions to reduce bond, habeas motions to reduce bond, or habeas corpus petitions) is most effective at getting bail amounts reduced: how often each results in a reduced bond, how much of a reduction results on average from each method. This could help public defenders to target their limited resources into the most effective channel for challenging pretrial conditions of release.

- Research into whether motions for reduced bond and habeas petitions speed indictments and seek stakeholder feedback from public defenders on whether this harms or helps their clients.

Advocacy urging more frequent reviews than just each term:

Perhaps at least every 90 days since defendants who are in jail for over 90 days are those whose bail is meant to be reviewed.

D. Rule 9 Utilization

Our interviews indicated that Rule 9 appeals are virtually unheard of due to the cost of filing an appeal, fear that doing so could lead to adverse precedents by the Mississippi Supreme Court, and fear of retribution from judges against public defenders who use Rule 9 to overturn excessive bail decisions. Strategies to enhance use of Rule 9 could include:

Creating a public defender toolkit:

One public defender suggested that a simple form might be enough to help guide and encourage public defenders, who could look at draft motions, draft petitions, and relevant case law citations.

Impact litigation:

In addition to using Rule 9 to reduce excessive bail for individual defendants, Rule 9 appeals could lead to systemic change in how initial appearances are conducted. Specifically, the Mississippi Supreme Court could provide;

- Clarity on what constitutes proper application of Rule 8 at preliminary hearings and;
- A signal that all factors, not just the defendant's criminal history and offense, must be considered, and that the Rules must be fully utilized.

FOOTNOTES

1. <https://www.law.berkeley.edu/experiential/pro-bono-program/blast/>
2. See Appendix C for a list of interviews conducted.
3. These counties were selected based on the counties focused on in a report by the Sixth Amendment Center. The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense Services, 2018, https://sixthamendment.org/6AC/6AC_mississippi_report_2018.pdf.
4. See Appendix D for survey questions.
5. Miss. R. of Crim. P. 8.2 ("If such a determination is made, the court shall impose the least onerous condition(s) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large."). The rule lists 15 factors to weigh in evaluating the condition of release. <https://courts.ms.gov/research/rules/msrulesofcourt/Rules%20of%20Criminal%20Procedure%20Post-070117.pdf>.
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7. MS Jail Data Reports, MacArthur Justice Center, <https://www.msjaildata.com/data/>.
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17. Supra.
18. Maria Dinzeo, California Lawmakers Up Ante Against Money Bail With Pair of Bills, Courthouse News, January 27, 2021, <https://www.courthousenews.com/california-lawmakers-up-ante-against-money-bail-with-pair-of-bills/>; California Supreme Court rules cash bail unconstitutional for defendants who can't afford it, March 25, 2021, <https://www.sacbee.com/news/politics-government/capitol-alert/article250205350.html>
19. Cash Bail, MacArthur Justice Center, <https://www.macarthurjustice.org/issue/ending-the-punishment-of-poverty/cash-bail/> (last viewed Mar. 24, 2021).
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- <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>. Note that pre-COVID 19, Mississippi had become the second-highest incarcerator state. See Latest Data Shows Mississippi Now Ranked As Second Highest Prisoner in the Nation, fwd.us (Mar. 2, 2020), [https://www.fwd.us/news/latest-data-shows-mississippi-now-ranked-as-second-highest-imprisoner-in-the-nation/#:~:text=The%20data%20shows%20Mississippi's%20imprisonment,rate%20\(675%20per%20100%2C000\);](https://www.fwd.us/news/latest-data-shows-mississippi-now-ranked-as-second-highest-imprisoner-in-the-nation/#:~:text=The%20data%20shows%20Mississippi's%20imprisonment,rate%20(675%20per%20100%2C000);) see also Mississippi Surpasses Oklahoma as Second-Highest Imprisoning State, fwd.us, <https://www.fwd.us/wp-content/uploads/2020/03/MSvsOK.pdf>.
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 27. Id.
 28. Id.
 29. Miss. R. App. P. 9 <https://courts.ms.gov/research/rules/msrulesofcourt/Rules%20of%20Appellate%20Procedure%20Current.pdf>.
 30. Joseph Neff, Petty Charges, Princely Profits, The Marshall Project (July 13, 2018, 7:00 AM), <https://www.themarshallproject.org/2018/07/13/petty-charges-princely-profits>.
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 32. Miss. R. Crim. P. 5.1(c), 8.5.
 33. Id. 5.1(c).
 34. Id. 5.2(a), 8.5(a).
 35. Id. at 6.
 36. Miss. Crim. Code § 8.5(c).
 37. Miss. Code Ann. § 11-43-1.
 38. Id. 8.2 cmt.
 39. Id.
 40. Id.
 41. "OR" is a term meaning release on personal recognizance.
 42. Miss R. App. P. 9

APPENDIX

Appendix A

Mississippi Rules of Criminal Procedure

Rule 5.1 Procedure upon Arrest.

(a) Telephone Call. Any person under arrest shall be afforded a reasonable opportunity to make a telephone call to, or otherwise make effective communication with, any person the accused may choose.

(b) On Arrest without a Warrant. A person arrested without a warrant:

(1) may, unless prohibited by law, be released upon the defendant's personal recognizance after being notified in writing to appear at a specified time and place; or

(2) shall be released upon execution of an appearance bond set according to Rule 8, unless the charge upon which the person was arrested is not a bailable offense, and directed to appear at a specified time and place; or

(3) if not released pursuant to subsections (b)(1) or (b)(2), the accused shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest, before a judge for an initial appearance. If the person arrested is not taken before a judge as so required then, unless the offense for which the person was arrested is not a bailable offense, the person shall be released upon execution of an appearance bond in the amount of the minimum bail specified in Rule 8, and shall be directed to appear at a specified time and place.

In the event the defendant is released on the minimum amount provided in the bail schedule, the prosecuting attorney may file a motion with the court to reconsider the bond amount and the conditions of release, and the procedures thereafter shall be in accordance with Rule 8.

(c) On Arrest with a Warrant.

(1) If provision for bail or personal recognizance has been made by the judge issuing the arrest warrant, a person arrested with a warrant shall be released and directed to appear at a specified time and place.

(2) If the person arrested cannot meet the conditions of release provided in the warrant, or if no such conditions are prescribed:

(A) if such person was arrested pursuant to a warrant issued on a charging affidavit, the accused shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest,

before a judge for an initial appearance. If the person arrested has not been taken before a judge as required herein, unless the charge upon which the person was arrested is not a bailable offense, such person shall be released upon execution of an appearance bond in the amount of the minimum bail specified in Rule 8, and shall be notified in writing to appear at a specified time and place; or

(B) if such person was arrested pursuant to a capias issued upon an indictment, the accused shall be taken without unnecessary delay before a judge, who shall proceed as provided in Rule 8.

(3) The defendant shall be given a copy of the charging document.

Comment

Rule 5.1(a) gives official sanction to common existing practice. The opportunity to make a telephone call represents the minimum requirement and use of other appropriate means of communication, electronic or otherwise, may be allowed. Fundamental fairness dictates that a person who has been taken into custody be allowed to communicate to another that the accused is being held by the police and charged with a crime. Rule 5.1(a) thus serves to protect an accused's state and federal constitutional rights to bail, counsel, and due process. Rule 5.1(b) lists the options available to law enforcement officers in the case of warrantless arrests. An officer may: (1) release the offender on personal 20 recognizance and issue a notice requiring the person to appear at a specified time and place; (2) release the offender on execution of an appearance bond set according to Rule 8 and direct the person to appear at a specified time and place; or (3) take the offender into custody and provide the person with an opportunity to make bail. A person may not be released on personal recognizance where prohibited by law. See, e.g., Miss. Code Ann. § 99-5-37 (regarding arrest for listed domestic violence offenses). Under Rule 5.1(b)(3), if a person is taken into custody, the person shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest, before a judge who shall proceed with an initial appearance. If the person arrested is not taken before a judge within forty-eight (48) hours, the person detained shall be released on execution of an appearance bond in the minimum amount set pursuant to Rule 8 and directed to appear at a specified time and place. Rule 5.1(b)(3) conforms to the U.S. Supreme Court's holdings in *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991).

Rule 8.2: Right to Pretrial Release on Personal Recognizance or on Bond.

(a) Right to Release. Any defendant charged with an offense bailable as a matter of right shall be released pending or during trial on the defendant's personal recognizance or on an appearance bond unless the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court shall impose the least onerous condition(s) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court shall take into account the following:

- (1) the age, background and family ties, relationships and circumstances of the defendant;
- (2) the defendant's reputation, character, and health;

- (3) the defendant's prior criminal record, including prior releases on recognizance or on unsecured or secured appearance bonds, and other pending cases;
- (4) the identity of responsible members of the community who will vouch for the defendant's reliability;
- (5) violence or lack of violence in the alleged commission of the offense;
- (6) the nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance;
- (7) the type of weapon used (e.g., knife, pistol, shotgun, sawed-off shotgun, assault or automatic weapon, explosive device, etc.);
- (8) threats made against victims or witnesses;
- (9) the value of property taken during the alleged commission of the offense;
- (10) whether the property allegedly taken was recovered or not, and damage or lack of damage to the property allegedly taken;
- (11) residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's domicile;
- (12) in cases where the defendant is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond;
- (13) consideration of the defendant's employment status and history, the location of defendant's employment (e.g., whether employed in the county where the alleged offense occurred), and the defendant's financial condition;
- (14) sentence enhancements, if any, included in the charging document; and
- (15) any other fact or circumstance bearing on the risk of nonappearance or on the danger to others or to the public.

Comment

Rule 8.2 embodies the guarantee against excessive bail provided by article 3, section 29, of the Mississippi Constitution, within the limitations stated therein. Rule 8.2 is based on the presumption of innocence of the accused, the constitutional right of a defendant charged with a noncapital offense to be released on bail, and the policy that a defendant should be released pending trial whenever possible. Under section (a), a defendant charged with an offense that is bailable as a matter of right is eligible for a personal recognizance release unless the judge determines that the defendant's presence would not be reasonably assured or that the defendant poses a real and present danger of harm to others. See *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1986) (upholding the constitutionality of pretrial detention based on dangerousness). Section (a) makes it possible to release on bail indigent defendants on non-financial conditions that make it reasonably likely that the defendant will appear. See *Bandy v. United States*, 81 S. Ct. 197, 5 L. Ed. 2d 218 (1960) (questioning constitutionality of holding indigent defendant in custody for no reason other than the inability to raise money for bail). 45 Sections (a)(1) - (15) provide detailed guidance for the judge setting bond as to the range of inquiries that should be made prior to setting the conditions on, or the amount of, any personal recognizance or appearance bond. While no prior rule or statute required the inquiry described in section (a), such an inquiry has always been within the sound discretion and inherent power of a court setting terms of release. See *Lee v. Lawson*, 375 So. 2d 1019, 1024 (Miss. 1979) (suggesting similar inquiry). Section (a) is intended to provide a helpful, nonexhaustive list for any court making such an inquiry, and is written to ensure that a judge not give inordinate weight to the nature of the present charge. Section (b) provides that, in the event of a conflict with the amounts listed in (c), statutory limits on a

judge's bail authority will control. See, e.g., Miss. Code Ann. § 99-5-37 (defendant charged with certain domestic violence offenses). While section (c) makes clear that the judge retains discretion to set any amount of bail above or below the suggested range, the bond guidelines set forth in section (c) should help reduce the disparities between courts who previously set bail without the guidance of a scheduled range. "Capital felony" is defined in Mississippi Code Section 1-3-4.

Rule 8.5 Procedure for Determination of Release Conditions.

(a) Initial Decision. When a defendant is brought before a court for initial appearance, a determination of the conditions of release shall be made. The judge shall issue an order containing the conditions of release and shall inform the defendant of the conditions, the possible consequences of their violation, and that a warrant for the defendant's arrest may be issued immediately upon report of a violation.

(b) Amendment of Conditions. The court may, for good cause shown, on its own initiative or on application of either party, modify the conditions of release, 48 after first giving the parties an adequate opportunity to respond to the proposed modification.

(c) Review by Circuit Court. No later than seven (7) days before the commencement of each term of circuit court in which criminal cases are adjudicated, the official(s) having custody of felony defendants being held for trial, grand jury action, or extradition within the county (or within the county's judicial districts in which the court terms to be held) shall provide the presiding judge, the district attorney, and the clerk of the circuit court the names of all defendants in their custody, the charge(s) upon which they are being held, and the date they were most recently taken into custody. The senior circuit judge, or such other judge as the senior circuit judge designates, shall review the conditions of release for every felony defendant who is eligible for bail and has been in jail for more than ninety (90) days.

Comment

Rule 8.5 establishes a mechanism for setting bail, and for periodically reviewing bail which has been set but has not been posted. These notice and review requirements should enhance the procedure for ensuring speedy trials or other timely dispositions of criminal cases, and should help avoid the possibility that a person in detention is overlooked by those having custody of that person. The conditions of release will usually be set on the arrest warrant at the time of its issuance, pursuant to Rule 3.2(a). If not, or if the defendant cannot meet the conditions, the defendant will be afforded a release hearing at the initial appearance as provided by Rules 5.1 and 5.2. Thereafter, under section (b), the conditions can be modified, to be made either more or less stringent, depending on the circumstances. Section (c) is particularly important in requiring that the court and other interested personnel in the judicial system receive notice prior to each court term of the identities of those being held in custody, either without bail or without the ability to post bail. The clerk of the circuit court shall maintain the lists required by section (c). Section (c) also requires a review of the detention or bail status of those who have remained in custody for more than ninety (90) days.

Appendix B

Mississippi Rule of Appellate Procedure 9: RELEASE IN CRIMINAL CASES

(a) Release Prior to a Judgment of Conviction. A petition challenging an order refusing or imposing conditions of release shall be heard promptly by the Supreme Court or the Court of Appeals if the case has been assigned to the Court of Appeals. Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken. Where the petition challenges an order denying bail or setting bail which the challenging party contends is excessive, the challenging party shall file contemporaneously with the petition such papers, affidavits, and portions of the record as will show:

- (1) the nature and circumstances of the offense charged;
- (2) the weight of the evidence;
- (3) family ties of the defendant;
- (4) defendant's employment status;
- (5) defendant's financial resources;
- (6) defendant's character and mental condition;
- (7) defendant's length of residence in the community;
- (8) defendant's record of prior convictions;
- (9) defendant's record of appearances or flight;
- (10) a copy of the trial court's order regarding bail;
- (11) where available, a transcript of the trial court proceedings regarding bail. If the party is unable to obtain such a transcript, the party shall state in an affidavit the reasons the party cannot obtain it;
- (12) such other matters as may be deemed pertinent.

An original and four (4) copies of the petition and accompanying documents shall be filed with the clerk of the Supreme Court. The Supreme Court or the Court of Appeals may require that additional copies be furnished.

(b) Release Pending Appeal From a Judgment of Conviction. Release after judgment of conviction of a felony and pending direct appeal shall be governed by statute and uniform rule. A party seeking release shall file with the party's motion for release the same papers, affidavits, and portions of the record as are required by Rule 9(a).

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 9 replaced Miss.Sup.Ct.R. 9, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXVII-XXXVIII (West Miss.Cases 1994).

Comment

Rule 9(a) is substantially patterned after Fed. R. App. P. 9(a). Subdivision (b) continues Mississippi practice for release after judgment of conviction provided in MRCrP 8.3, Miss. Code Ann. §§ 99-35-105, -107, -109 (1994), Miss. Code Ann. § 99-35-115 (1994), Miss. Code Ann. § 99-35-117 (1994). Both 9(a) and (b) require the party seeking release to provide the appellate court with certain information relevant to release. See former 5th Cir. R. 9.1, 9.2. Normally these facts will be part of the record in the trial court. Both petitions under 9(a) and motions under 9(b) will be handled by the appropriate appellate court as motions under Rule 27.

Appendix C

Record of Interviews Conducted

Date	Name	Title	County
2/16/21	R. Geoffrey Germany, Jr.	Assistant Public Defender	Harrison
2/19/21	Lauren Hillery	Assistant Public Defender	Hinds
2/22/21	Hon. Eileen M. Maher	Justice Court Judge	Adams
2/22/21	Hon. Audrey B. Minor	Justice Court Judge	Adams
2/23/21	Anonymous	Judge	Clarke
2/24/21	Angela Broun Blackwell	Assistant Public Defender	Harrison
2/25/21	Hon. June Hardwick	Municipal Court Judge	Hinds
2/25/21	Mariah Stringer	Attorney	Hinds
2/26/21	Anonymous	Public Defender	Hinds
3/1/21	Matthew Busby	Attorney	Pearl River
3/5/21	Hon. Lillie Blackmon Sanders	Circuit Court Judge	Adams 6th District
3/8/21	Hon. Anthony A. Mozingo	Circuit Court Judge	Pearl River 15th District
3/9/21	Hon. Gay Polk-Payton	Justice Court Judge; Municipal Court Judge; Attorney	Forrest
3/11/21	Anonymous	Circuit Court Judge	Anonymous

Date	Name	Title	County
3/12/21	Anonymous	Defense Attorney	Lowndes
3/12/21	Hon. Anthony Nowak	Municipal Court Judge	DeSoto
3/15/21	Hon. Carol White Richard	Circuit Court Judge	Leflore 4th District

Note: Interview data is on file with report preparers.

Appendix D

Survey Questions: Public Defender Survey

- Name and Title of Person Surveyed
- Can we use your name and title in a report? If not, how should we refer to you?
- Can I record this interview for accuracy purposes?
 - Yes
 - No
- Are you employed full time or part time as a public defender?
 - Full time
 - Part time
 - Other: _____
- How long have you worked as a public defender?
- What is your typical caseload at any one point in time?
- Of your typical caseload, what percentage of your clients have legal representation during their pretrial-release proceedings?
- Did you provide pre-trial representation for those clients or did someone else?
 - I did
 - Someone else
 - Other: _____
- If you do represent a client at a pretrial-release hearing, do you typically have enough time to review the case before the hearing?
 - Yes
 - No
 - Other: _____
- What, if any, changes in pretrial-release hearings have you observed since the new Rule 8 and 9 procedures were implemented?
- In your experience, do judges seem to follow the Rule 8 procedure?
- What Rule 8 factors for pretrial release do judges seem to weigh most heavily during pretrial-release hearings?
- Do judges explain their reasoning when imposing pretrial release conditions?
- How often do you feel judges impose excessive bail on a defendant under Rule 8?
 - Never
 - Infrequently
 - Sometimes
 - Most of the time
 - Always
- How often do judges fail to impose the least restrictive conditions of release on a client?
 - Never
 - Infrequently

- Sometimes
- Most of the time
- Always
- How long does an average bail hearing take?
- If you have represented clients at pretrial release hearings, do you feel your presence or the presence of a defense attorney influences the judge's decision when setting bail?
- How often do you represent more than one client at a bail hearing?
 - Never
 - Infrequently
 - Sometimes
 - Most of the time
 - Always
- Have you ever made a Rule 9 appeals motion? [Rule 9 of the rule of appellate (not criminal) procedure]
 - Yes
 - No
 - Other: _____
- If you have filed a Rule 9 appeals motion, how many? How many were successful?
- If you have filed a Rule 9 appeals motion, what is the name of the case? Do you know of any ways to view the case information publicly?
- How likely are you to appeal using Rule 9?
- What factors influence your decision to appeal/not to appeal?
- If you choose not to file a Rule 9 appeal, what are the factors that weigh most heavily in that decision? Does the judge ever influence this decision?
- What information and/or tools would you find helpful in appealing decisions via Rule 9?
- Do you have any colleagues that may be interested in speaking to me about pretrial detention practices in Mississippi? If so, what is their contact information?
- Do you have any clients that may be interested in speaking to me about how pretrial detention has impacted their life? If so, what is their contact information? (If you'd prefer to contact the client first to ask for their permission, you can also send me their contact information via email.)
- Is there anything else I didn't ask about that would be helpful to know?

Justice or Municipal Court Judge Survey

- Name and Title of Person Surveyed
- Can we use your name and title in a report? If not, how should we refer to you?
- Can I record this interview for accuracy purposes?
 - Yes
 - No
- How long have you served as a Judge?
- Can you walk me through how you run a Rule 8 bail/pre-trial hearing?
- What inquiries do you make in setting bail/allowing release? What factors are most important to your decision-making when setting a higher bail versus choosing to allow release (on personal recognizance "recon")?

- INTERNAL NOTE: Which of the Rule 8.2 factors did the judge mention they use when making a determination on condition of release? (check all that apply). See pg. 42-43 here for more context: <https://courts.ms.gov/research/rules/msrulesofcourt/Rules%20of%20Criminal%20Procedure%20Post-070117.pdf>.
- Check all that apply:
 - (1) age, background and family ties, relationships and circumstances of the defendant;
 - (2) defendant's reputation, character, and health;
 - (3) defendant's prior criminal record, including prior releases on recognizance or on unsecured or secured appearance bonds, and other pending cases;
 - (4) the identity of responsible members of the community who will vouch for the defendant's reliability;
 - (5) violence or lack of violence in the alleged commission of the offense;
 - (6) the nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of appearance;
 - (7) the type of weapon used (e.g., knife, pistol, shotgun, sawed-off shotgun, assault or automatic weapon, explosive device, etc.);
 - (8) threats made against victims or witnesses;
 - (9) the value of property taken during the alleged commission of the offense;
 - (10) whether the property allegedly taken was recovered or not, and damage or lack of damage to the property allegedly taken;
 - (11) residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's domicile;
 - (12) in cases where the defendant is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond;
 - (13) consideration of the defendant's employment status and history, the location of defendant's employment (e.g. whether employed in the county where the alleged offense occurred), and the defendant's financial condition;
 - (14) sentence enhancements, if any, included in the charging document; and
 - (15) any other fact or circumstance bearing on the risk of nonappearance or on the danger to others or to the public.

- Have you changed how you run Rule 8 bail/pre-trial hearings in the last two years/after the recent reforms to that rule?
- Do you hire/appoint attorneys to indigent defendants' cases? If so, what factors do you consider in determining who to appoint?
- Are indigent defendants ever represented in Rule 8 bail/pre-trial hearings? If so, can you estimate what percentage are represented?
- When defendants are represented in those hearings do you change the process you mentioned earlier?
- Are you aware of any instances where an attorney appealed one of your bail decisions via Rule 9?
- Is there anything else I didn't ask about that would be helpful to know?

Circuit Court Judge Survey

- Name and Title of Person Surveyed
- Can we use your name and title in a report? If not, how should we refer to you?
- Can I record this interview for accuracy purposes?
 - Yes
 - No
- How long have you served as a Judge?
- How frequently do you review conditions of pretrial release from justice or municipal courts?
 - Never
 - Infrequently
 - Sometimes
 - Most of the time
 - Always
- When you do review pretrial condition of release, how would you describe the conditions imposed by the municipal or justice court?
 - Too restrictive
 - Not restrictive enough
 - Just right
- Have you reduced bail from what the justice/municipal court imposed? If not, why?
- What inquiries do you make in setting bail/allowing release? What factors are most important to your decision-making when setting a higher bail versus choosing to allow release (on personal recognizance "recon")?
 - INTERNAL NOTE: Which of the Rule 8.2 factors did the judge mention they use when making a determination on condition of release? (See pg. 42-43 here for more context: <https://courts.ms.gov/research/rules/msrulesofcourt/Rules%20of%20Criminal%20Procedure%20Post-070117.pdf>.)
 - Check all that apply:
 - (1) age, background and family ties, relationships and circumstances of the defendant;
 - (2) defendant's reputation, character, and health;
 - (3) defendant's prior criminal record, including prior releases on recognizance or on unsecured or secured appearance bonds, and other pending cases;
 - (4) the identity of responsible members of the community who will vouch for the defendant's reliability;
 - (5) violence or lack of violence in the alleged commission of the offense;
 - (6) the nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of appearance;
 - (7) the type of weapon used (e.g., knife, pistol, shotgun, sawed-off shotgun, assault or automatic weapon, explosive device, etc.);
 - (8) threats made against victims or witnesses;
 - (9) the value of property taken during the alleged commission of the offense;
 - (10) whether the property allegedly taken was recovered or not, and damage or lack of damage to the property allegedly taken;



(11) residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's domicile;

(12) in cases where the defendant is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond;

(13) consideration of the defendant's employment status and history, the location of defendant's employment (e.g. whether employed in the county where the alleged offense occurred), and the defendant's financial condition;

(14) sentence enhancements, if any, included in the charging document; and

(15) any other fact or circumstance bearing on the risk of nonappearance or on the danger to others or to the public.

- Is there anything else I didn't ask about that would be helpful to know?